(12)

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* THE PRISONERS' RIGHTS PROJECT OF THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK AND PRISONERS' LEGAL SERVICES OF NEW YORK IN SUPPORT OF RESPONDENTS

STEPHEN M. LATIMER
Counsel of Record

DAVID C. LEVEN
Prisoners' Legal Services of New York
105 Chambers Street
New York, New York 10007
(212) 513-7373

PHILIP L. WEINSTEIN
DAVID A. LEWIS
Legal Aid Society
Prisoners' Right Project
15 Park Row—7th Floor
New York, New York 10038
(212) 577-3530

Counsel for Amici

10pp

TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE..... 1

STATEMENT..... 3

SUMMARY OF ARGUMENT..... 11

ARGUMENT..... 17

I. SINCE THE BEGINNING OF THE REPUBLIC, RELIGIOUS SERVICES HAVE PLAYED A PROMINENT ROLE IN PRISON LIFE..... 17

II. THE STATE OF NEW YORK REASONABLY ACCOMMODATES THE RELIGIOUS NEEDS OF ITS PRISONERS WITH NO DETRIMENTAL EFFECTS ON THE SECURITY OF ITS PRISONS..... 23

III. PRISON OFFICIALS MUST ACCOMMODATE THE FREE EXERCISE OF RELIGION BY PRISONERS EXCEPT WHERE A RESTRICTION IS JUSTIFIED AS "NECESSARY OR ESSENTIAL" TO SUBSTANTIAL PENOLOGICAL INTERESTS..... 35

A. The constitutional standard for evaluating First Amendment deprivations in a prison context was settled by this Court in Procunier v. Martinez, 416 U.S. 396 (1974)..... 35

B. The deferential standard expressed in Pell v. Procunier, Jones v. North Carolina Prisoners' Union, and Bell v. Wolfish is applicable only where prison officials have taken substantial steps to accommodate First Amendment rights..... 41

C. The unduly deferential standard formulated by the Third Circuit in St. Claire v. Cuyler would, if adopted, practically eliminate the protection of religious freedom of prisoners..... 47

D. Petitioners' justifications for denying access to the Jumu'ah services are not substantial..... 54

CONCLUSION..... 63

TABLE OF AUTHORITIES

Cases:

Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985) 15, 36, 38, 44

Barrett v. Virginia, 689 F.2d 498 (4th Cir. 1982) 15, 36, 42, 45, 55, 57

Bell v. Wolfish, 441 U.S. 520 (1979)..... 14, 36, 41, 44

Block v. Rutherford, 468 U.S. 576 (1984)..... 51

Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984), cert. denied, 469 U.S. 1215 (1985)..... 59

Brown v. McGinnis, 10 N.Y.2d 531 (1962)..... 25

Bryant v. McGinnis, 463 F. Supp. 373 (W.D.N.Y. 1978) 12, 25, 26, 52

Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986)..... 22

Cole v. Flick, 758 F.2d 124 (3d Cir.), cert. denied, 106 S. Ct. 253 (1985)..... 29

Cooper v. Pate, 378 U.S. 546 (1964)..... 35

Cruz v. Beto, 405 U.S. 319 (1972) (per curiam).. 13, 15, 35, 37, 48

Goldman v. Weinberger, ____ U.S. ___, 106 S. Ct. 1310 (1986)..... 55

Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) 14, 15, 36, 41, 42, 44, 45, 59

Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976)..... 22, 33

Monroe v. Bombard, 422 F. Supp. 211 (S.D.N.Y. 1976)..... 28

Pell v. Procunier, 417 U.S. 817 (1974) 14, 17, 36, 41, 43, 44

Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961)..... 25

Procunier v. Martinez, 416 U.S. 396 (1974)... 13, 35, 37, 38, 39, 40, 55, 57

SaMarion v McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966)..... 25

Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) (en banc)..... 40, 54

Shabazz v. O'Lone, 595 F. Supp. 928 (D. N.J. 1984)..... 3, 36

Smith v. Coughlin, 748 F.2d 783 (2d Cir. 1984)..... 22

St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980)..... 15, 32, 48, 49

Tyler v. Rapone, 603 F. Supp. 268 (E.D. Pa. 1985)..... 22

Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985)..... 22

New York State Department of Correctional Services Directives (lodged with the Clerk of the Court):

Directive 4202 (dated 11/26/82)..... 28, 32, 33, 34

Directive 4204 (dated 10/1/76)..... 28, 32

Directive 4914 (dated 12/4/86)..... 28, 29

Directive 4914 (dated 1/7/77)..... 28, 30

Directive 4914 (dated 9/13/76)..... 28, 29

Other:

ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners (Tent. Draft 1977), 14 Am. Crim. L. Rev. 377 (1977)... 27

American Correctional Association, Manual of Correctional Standards (3d ed. 1966)..... 18, 19

Barnes, The Evolution of Penology in Pennsylvania (1927)..... 18, 20, 21

D. Dix, Remarks on Prisons and Prison Discipline in the United States (1845)..... 19, 20

J. Jacobs, Stateville: The Penitentiary in Mass Society (1977).... 27, 52

INTERESTS OF AMICI CURIAE

Amici submit this brief with the consent of the parties in order to present the experience of New York State in accommodating varied religious practices by prisoners and to present their view of the constitutional standard applicable to First Amendment claims in the context of prisons.

Prisoners' Legal Services of New York is a non-profit corporation under contract to, and funded by, the State of New York, whose purpose is to represent inmates in New York State prisons in matters relating to their conditions of confinement and in other civil matters. The Legal Aid Society of the City of New York is a private organization which serves the legal needs of the poor in many ways and which, through its Prisoners' Rights Project, assists and

provides representation to prisoners in New York. Both Amici have represented inmates in significant cases involving First Amendment rights. Both have familiarity with the policies and practices of the New York State Department of Correctional Services with respect to the accommodation of religious practices.

S T A T E M E N T

This case was brought by Ahmad Uthman Shabazz and Sadr-Ud-Din Mateen, two inmates at Leesburg State Penitentiary. Shabazz and Mateen are members of the Muslim faith, and the sincerity of their beliefs has not been questioned. Shabazz v. O'Lone, 595 F. Supp. 928, 929 (D.N.J. 1984). Both Shabazz and Mateen were "gang-minimum" inmates at the time the suit was initiated and were required to work outside the Main Building of the prison five days a week, including Friday (Tr. 29-31; 40). This requirement precluded their attendance at Jumu'ah, the "central service of the Muslim religion... commanded by the Qur'an, the central book of the Muslim religion." 595 F. Supp. at 930. Jumu'ah is held inside the prison shortly after midday Friday, and all maximum-security Muslims

working inside the prison may attend (Tr. 92, 195). Shabazz and Mateen sued to be allowed to attend the Jumu'ah services.[1]

Prior to March, 1984, Mateen had been allowed to attend Jumu'ah even though his regular work detail was outside the prison (Tr. 26).[2] Four days a week he worked on a detail cutting down trees in the woods one or two miles from the prison (Tr. 24, 203-04). On Friday, however, he and between 11 and 22 other Muslims on outside details were permitted to work on the prison grounds sawing logs into 16-inch lengths (Tr. 26-27, 209). They could thus attend religious services (Tr. 26). Mateen testified that there was always work of this kind to be done (Tr. 27), and petitioner O'Lone noted that the prison had sold $40,000 dollars worth of cut wood the previous year (Tr. 153).[3]

In March, 1984, however, petitioners made the alternate Friday wood-cutting detail a maximum-security detail, and forbade respondents' participation in it (Tr. 68, 70). Thereafter, Mateen and the other Muslims

---

[1]Descriptions of the Leesburg prison, of the mandates of Muslim religious practice, and of the proceedings below are adequately set out in the other briefs and the opinions below. We address the facts only insofar as they concern petitioners' refusal to accommodate Muslim religious practice by allowing respondents to work on an alternate work detail on Fridays. There may be several other reasonable means by which such an accommodation could be made.

[2]Prior to March, 1984, Shabazz had been employed inside the prison and thus had full access to Jumu'ah (Tr. 45-46). Thereafter, he was assigned to an outside work detail and was in the same position as Mateen.

[3]After May 31, 1984, Mateen was assigned to the minimum-security farm unit where he could attend Jumu'ah services (Tr. 31-32). For the sake of brevity and clarity, we are restricting our analysis solely to the situation of gang-minimum inmates.

assigned to outside work details could not return to the main prison to attend religious services (Tr. 31). So far as Amici can discern, the record does not indicate why the petitioners decided no longer to allow gang-minimum inmates to participate in the detail.[4]

Petitioners did try to advance

[4]Petitioners now claim that the alternate detail caused "problems" because "only half" the Muslims requesting it actually attended services (Pet. Br. at 15). We think the record on this point is exceedingly thin. Both petitioners Ucci and O'Lone stated that inmates coming back to the facility after going outside did not arrive at their destinations (Tr. 72, 181), with O'Lone relying entirely on Ucci's testimony (Tr. 181). But Muslim inmates attending Jumu'ah never did go outside; they stayed in (Tr. 26-27, 105, 176). Thus we think that Ucci's statement "Let's say that 50 percent of inmates that were coming in for Jumu'ah didn't show up for Jumu'ah" (Tr. 72) (emphasis added) was, as its form suggests, purely hypothetical and not a statement of fact. It is wholly inconsistent with the rest of the record which shows that Muslims never returned to Jumu'ah. There is no evidence that either Shabazz or Mateen ever failed to (fn. cont'd)

reasons for denying respondents access to Jumu'ah. O'Lone first argued that allowing some inmates to escape their "rigorous" work by participating in the alternate detail on Friday might cause resentment among others (Tr. 178-79). He thus appeared either to be unaware that the work of the detail was to cut logs into 16-inch lengths or to believe that this was not rigorous work (Tr. 176).

Petitioner O'Lone also took the position that allowing between 11 and 22 gang-minimum Muslims to work together for a few hours on Fridays (Tr. 159-60) would create an "affinity group"[5] that

[4](fn. cont'd) go to Jumu'ah. Even if this "problem" existed, petitioners stated they had means of dealing with it. When inmates coming in from outside did not show up at their assigned destinations, they were disciplined (Tr. 72, 181).

[5]The Muslims who would allegedly form the affinity group are not among the (fn. cont'd)

could "challenge institutional authority" (Tr. 180) and that would "absolutely lead to confrontation" (Tr. 182). The record shows, however, that Muslims have existed as a group at Leesburg for at least five years (Tr. 26) and that petitioners do not regard them as more dangerous than other prisoners (Tr. 138-39). Petitioners allow even maximum-security Muslims to meet in the presence of their Imam as often as they wish (Tr. 92, 182-83) and they allow minimum-security Muslims to meet without supervision (Tr. 195). They allow weekly Jumu'ah services and Wednesday prayer meetings (Tr. 92, 195). For thirty days during Ramadan, they permit Muslims to meet together before dawn and after sunset in the mess hall to eat and pray (Jt. App. at 137-45).

5(fn. cont'd)most dangerous inmates at Leesburg. They are considered sufficiently trustworthy to work outside the prison.

Prior to March, 1984 they allowed gang-minimum Muslims to work together on the alternate detail.

Petitioner O'Lone also articulated a security goal, somewhat vaguely stated, of reducing population "pressure" on the housing units, mess hall, and gymnasium on weekdays (Tr. 159, 176). Petitioners' documents show that between July, 1983 and March, 1984 the population of the medium facility varied between a high of 770 in October, 1983 and a low of 697 in March, 1984 (Jt. App. at 122-32). On the average, 615 inmates remained inside each day.6

6By comparing plaintiffs' Exhibit 2 at trial with defendants' Exhibit 2 one can derive the number of inmates remaining inside the prison during the day for several dates (Jt. App. at 121-137). For example, on July 30, 1983 there were 754 inmates in the medium unit, and the previous day 126 inmates were assigned outside, leaving 628 in the facility. The following figures for the dates noted have been derived in the same way: (fn.cont'd).

The inmates remaining inside work from 8:00 A.M. to 11:00 A.M. and from about 1:00 P.M. to 3:00 P.M. (Tr. 159-60). At 11:30 A.M. all inmates are locked in for the count (Tr. 80), and Jumu'ah is held at 12:00 noon while non-Muslim inmates are eating (Tr. 78-79). The record does not state when or where Muslims eat lunch if they do at all. Petitioner O'Lone did not specifically explain how the presence of ten or twenty Muslims in the prison on Fridays exacerbated crowding in housing areas, mess hall or gymnasium, and the record

---

[6](fn. cont'd) 10/31/83, 629; 11/30/83, 587; 12/31/83, 600; 1/31/84, 614; 2/29/84, 613. Thus, the number of inmates working in the institution at the beginning of March, 1984 was not particularly large and was, indeed, smaller than it had been in the summer and fall of 1983.

strongly suggests that the Muslims were not even present in those areas.[7]

SUMMARY OF ARGUMENT

I. Prisoners in American penal institutions have been permitted to attend congregate religious services since the founding of this nation. In the mid-19th century, American prisons routinely held religious services on Sunday. This tradition has continued and, as a rule, access to congregate

---

[7]As a final justification, petitioner Ucci claimed that it was "impossible" to assign jobs based on religion (Tr. 141). Petitioners do assign jobs in the piggery on the basis of religion, however, for they exempt Muslims, and presumably Jews, from them (Tr. 172). Petitioners also assigned jobs on the alternate detail on Friday to inmates based on religion until March, 1984. The trial court rejected, and petitioners do not appear to renew, their argument that they could not mix maximum-security and gang-minimum-security Muslims on a detail. See 595 F. Supp. at 932.

religious services of bona fide religions has been forbidden only in cases of emergency or where the inmates seeking to participate were high-security or disciplinary cases. Indeed, this case may be unique in that low-security inmates are denied the right to attend services, while high-security inmates may do so.

II. The recent history of religious practice in the prisons of New York has been one of accommodation of diverse religious practices, often after initial resistance to them based on security concerns. Initially, for example, prison officials argued that permitting the practice of the Black Muslim religion would "inevitably" lead to "riots, bloodshed, death and destruction." Bryant v. McGinnis, 463 F. Supp. 373, 381 (W.D.N.Y. 1978).

Eventually, however, Muslim practices were accommodated and these predictions went unfulfilled. Similarly, New York has long accommodated religious precepts concerning wearing beards, wearing long hair, and wearing religious vestments such as kufis without encountering the dire consequences predicted if such practices were allowed.

III. Cruz v. Beto, 405 U.S. 319 (1972), established that prison inmates have a First Amendment right to "reasonable opportunities" to practice their religion. Id. at 322. Following Cruz, the Court elaborated in Procunier v. Martinez, 416 U.S. 396 (1974), the scope of such established First Amendment rights "in the context of prisons." Id. at 412. The Court held that restrictions on the exercise of First Amendment rights must be shown

to further one of the "substantial governmental interests of security, order, and rehabilitation," id. at 413, and "the limitation of First Amendment Freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Id.

Petitioners' reliance on the "rational relationship" ... "exaggerated response" language in Pell v. Procunier, 417 U.S. 817 (1974), Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) and Bell v. Wolfish, 441 U.S. 520 (1979), is misplaced. As Pell explicitly held, see 417 U.S. at 827, that language applies where alternate means of exercising a First Amendment right exist. The Procunier v. Martinez standard survives these cases and is applicable to encroachments on First

Amendment rights that are not mere "time, place or manner" restrictions. Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985); Barrett v. Virginia, 689 F.2d 498, 502 (4th Cir. 1982); see Jones v. North Carolina Prisoners' Union, 433 U.S. at 133.

The constitutional standard established in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), provides inadequate protection for the right declared in Cruz v. Beto, 405 U.S. 319. Regardless of the breadth of the limitation of religious rights involved, it requires prison officials only to articulate an abstract, logical connection between their regulation and a security concern and places the burden on prisoners to overcome this by "substantial evidence" showing it to be an "exaggerated response." In the

context of congregate religious services, this could rarely, if ever, be done. Moreover, the St. Claire test leaves out of account the crucial consideration of whether there are means by which both security and religious needs may be met.

None of the security "concerns" advanced by petitioners is sufficiently substantial to justify cutting off respondents' access to Jumu'ah by abolishing the alternate Friday detail. On the facts here, the argument that the Muslims on the detail would form a dangerous "affinity group" is irrational given petitioners' own behavior in allowing Muslims to associate freely. The argument that other inmates would resent Muslims' exemption on Friday from rigorous work is equally frivolous, for the alternate detail was itself

rigorous. Finally, beyond invoking the word "overcrowding," petitioners completely failed to explain how allowing a few Muslims to remain inside one day a week would have any significant effect on security. These justifications are not sufficiently weighty to justify a prohibition on a central religious practice.

ARGUMENT

I. SINCE THE BEGINNING OF THE REPUBLIC, RELIGIOUS SERVICES HAVE PLAYED A PROMINENT ROLE IN PRISON LIFE.

In the history of this nation, participation by a prison inmate in religious services has never been thought to be "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier,

417 U.S. 817, 822 (1974). Indeed, religious services have played a central role in prison life since they were introduced into the Walnut Street Jail in 1787 by the Philadelphia Society for Alleviating The Miseries of Public Prisons. H. Barnes, The Evolution of Penology in Pennsylvania 85 (1927). The American Correctional Association has recognized that "the importance of eternity itself gives every person the innate right of freedom of religion; and therefore the basic need for priests, ministers, rabbis, chaplains in correction institutions." ACA, Manual of Correctional Standards 468 (3d ed. 1966). In furtherance of this goal the association adopted in its declaration of principles the following:

> Religion represents a rich resource in the moral and spiritual regeneration of mankind. Especially trained chaplains, religious instruc-

> tion and counseling, together with adequate facilities for group worship of the inmate's own choice, are essential elements in the program of a correctional institution.

Id. at xxi. This principle embodies practices that have existed in the prisons of the United States since before ratification of the present Constitution.

The early history of religious practices in prison in the United States was studied by Dorothea L. Dix who conducted a four year investigation of all prisons in the New England and Middle Atlantic States. D. Dix, Remarks on Prisons and Prison Discipline in the United States (1845). Virtually every prison that she visited had a chaplain on staff who was responsible for conducting religious services on Sunday and for providing moral and religious instruction to prisoners. For instance,

at Auburn prison she found that "nearly all the prisoners attend regular religious services once on the sabbath; and short but very impressive services, in the dining hall at the hours of meals, are observed twice daily." Id. at 55. At Sing Sing services were conducted "on Sabbath morning" in the men's and women's prison by the staff chaplain. Id. at 56.

Even in Pennsylvania, which operated its two penitentiaries on the "separate" system, under which prisoners were forbidden to congregate for any purpose, religious services were held. Prior to 1869, when the legislature first passed an act permitting prisoners to congregate for worship, the services were held in the corridor with prisoners listening at the doors of their cells. H. Barnes, Evolution of Penology in

Pennsylvania at 351-52, 354-56. After the legislative change, one observer reported:

> Then both cell doors were thrown wide open: the prisoners bringing their stools came out and seated themselves in the corridor at their cells where they could see each other and hear all the services.
>
> To them, these new and free methods of public religious services much more emphasized the meaning of liberty and love.

Id. at 356.

The long American tradition of encouraging participation by prisoners in religious services has continued to the modern era. In the period since 1960, when litigation concerning prisoners' religious rights commenced, there has been little, if any, controversy over accommodating the wishes of general population inmates to attend the services of accepted

religions.[8] Where there has been controversy it has arisen almost exclusively where prison circumstances were particularly dangerous or where prisoners were high-security or disciplinary cases.[9] But in the absence of such factors, the universal practice has been to accommodate attendance at important religious services.[10]

---

[8]There have been disputes about the genuineness of certain religions, of course.

[9]See, e.g., Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) (emergency lockdown); Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985) (lockdown after riot); Smith v. Coughlin, 748 F.2d 783, 789 (2d Cir. 1984) (inmate on death row for killing correction officer); Mawhinney v. Henderson, 542 F.2d 1, 2 (2d Cir. 1976) (inmate in punitive segregation); Tyler v. Rapone, 603 F. Supp. 268, 271 (E.D. Pa. 1985) (inmate with violent history in prison).

[10]Indeed, Amici believe that this case is unique in that low-security inmates are denied the right to attend services while high-security inmates may do so.

II. THE STATE OF NEW YORK REASONABLY ACCOMMODATES THE RELIGIOUS NEEDS OF ITS PRISONERS WITH NO DETRIMENTAL EFFECT ON THE SECURITY OF ITS PRISONS.

The history of religious freedom in the New York State prisons since 1961 is a history of initial resistance to minority religious practices followed by reasonable accommodation to the religious needs of inmates with diverse religious backgrounds. Notwithstanding strong initial opposition to new religious practices, based on predictions of a breakdown of prison security, New York State has since made provision for prayer and study services for various groups of inmates, has accommodated religious precepts concerning hair, beards and personal appearance, has accommodated dietary precepts and has permitted outside

clergy regular access to the institutions. Where a particular practice has raised a legitimate security concern, the State of New York has provided a reasonable alternative that permits inmates to practice their religions within the limits required by legitimate security concerns. In the experience of Amici, these accommodations have not had any deleterious effect on the functioning of the prison system.[11]

[11]Our conclusions in this respect are based on our observations of the prison system, our reviews of official documents concerning prison disturbances, official reports on prison events, press reports and reports by inmates. They are confirmed by the behavior of the New York State Department of Correctional Services in expanding the rights of inmates to practice Islam, wear beards and long hair or the like, rather than restricting them. See pp. 26-30, below. The State of New York has not filed an amicus brief in this case.

The first significant accommodations to non-Christian religions occurred after Black Muslim inmates instituted actions in the federal and state courts of New York seeking the freedom to exercise their religion.[12] See, e.g., Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Brown v. McGinnis, 10 N.Y.2d 531 (1962). The State adamantly opposed allowing free exercise by Black Muslims, asserting a security justification best expressed by Commissioner of Correction Paul McGinnis in an affidavit submitted in SaMarion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966) stating:

> [I]n the opinion of your deponent, rules and regulations permitting congrega-

[12]The history of this litigation is recounted in Bryant v. McGinnis, 463 F. Supp. 373, 375-85 (W.D.N.Y. 1978).

> gational services and visitations and preachments by Black Muslim ministers, irrespective of what restrictions there may be, will result inevitably in riots, bloodshed, death and destruction of State prison property on a scale never before experienced in the State of New York.

Bryant v. McGinnis, 463 F. Supp. 373, 381 (W.D.N.Y. 1978). Despite these extreme predictions, however, by 1970 New York prison officials had promulgated rules and regulations permitting Muslims to have "each and every right and privilege extended to Catholics, Protestants and Jews." Id. at 384 n.7.

Indeed, Commissioner McGinnis' fears have proved unfounded. Years of Muslim religious practice in New York prisons have caused no "riots, bloodshed, death [or] destruction." The State has not again sought to restrict

Muslim practices. So far as Amici are aware, Muslim groups are thought to pose no danger to the good order of the New York penal system.[13]

New York has similarly accommodated the religious precepts of Muslims concerning the wearing of beards. Prior to 1976, New York State prohibited all inmates from growing beards on the ground that they could change their appearance, thus making identification difficult and facilitating escapes. Prison officials also argued that

[13]Indeed, it is widely recognized that Muslim groups have become stabilizing influences in prisons. See J. Jacobs, Stateville: The Penitentiary in Mass Society 68-69 (1977); ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners (Tent. Draft 1977), 14 Am. Crim. L. Rev. 377, 419 (1977). In the prison rebellion at Attica in 1971, a disturbance in no way caused by the practice of Islam, Muslims swept up in the riot are credited with saving the lives of the officer hostages. ABA Joint Committee on the Legal Status of Prisoners, supra, at 419.

inmates could hide contraband in their beards. In Monroe v. Bombard, 422 F. Supp. 211, 217 (S.D.N.Y. 1976), the district court rejected both justifications and accepted an alternative to eliminate the identification problem: inmates could be re-photographed if their appearance drastically changed. Id. Monroe was not appealed and the state adopted regulations to accommodate this religious practice.

The accommodation is embodied in the original version of Department of Correctional Services Directive 4914 (dated 9/13/76).[14] So insignificant did

[14]The current Directive 4914, dated 12/4/86, as well as earlier versions dated 1/7/77 and 9/13/76 have been lodged with the Clerk of the Court as has Directive 4202, dated 11/26/82 and its predecessor, Directive 4204, dated 10/1/76, referred to below.

the resulting security effects prove to be that the Directive was later amended to permit all inmates regardless of religious belief to grow a beard or mustache. That regulation remains in effect today. Directive 4914 (dated 12/4/86).

Directive 4914 had originally permitted inmates to grow hair only to "the bottom of the back portion of the collar."[15] American Indians were permitted for religious reasons to grow hair to any length desired, but were required to tie the hair back

[15]Directive 4914 dated 9/13/76. Like beards, long hair has often been alleged to pose a serious security threat. In addition to making identification difficult and providing a place to hide contraband, it has been said that long hair might provoke attacks by "predatory homosexuals," that it is unsanitary and unsafe, and that letting one group wear long hair might cause conflict. Cole v. Flick, 758 F.2d 124, 126-28 (3d Cir.), cert. denied, 106 S.Ct. 253 (1985).

in a pony tail "when not involved in scheduled and approved Indian cultural ceremonies." Six months later the Directive was amended to permit all inmates to grow hair to any length they desired as long as hair longer than the bottom of the back of the neck was tied back in a pony tail. See Directive 4914 (dated 1/7/77). Just as with beards, initial security concerns proved unfounded and a privilege originally accorded to a particular religious group was extended to the entire population with no perceptible weakening of institutional security.

In 1974, the New York State Department of Correctional Services promulgated a Directive, presently Directive 4202, that provides uniform rules governing religious programs and reasonable accommodation of practices

for all religions whose adherents may be in prison. The rules provide for Sabbath services for all inmates, including keeplocked inmates,[16] religious study groups for inmates, attendance at religious programs, participation in individual prayer and devotions in certain parts of the prison, the wearing by American Indian, Muslim and Jewish inmates of religious vestments and insignia, certain dietary requirements, possession of religious publications and texts, and observance of Christian, American Indian, Jewish, Muslim, and Zen Buddhist holy days.

The Directive thus permits religious practices that prison officials in other jurisdictions have

---

[16]Keeplock is a form of disciplinary sanction whereby inmates are locked in their cells except for a one hour exercise period per day.

labeled serious security threats. In St. Claire v. Cuyler, 634 F.2d 109, 115 (3d Cir. 1980), for example, prison officials argued that wearing a kufi in dining areas could "interfere with decorum" and allow inmates to "conceal contraband." They also argued that permitting such means of "group identification" would lead to conflicts between groups. Id. In New York, however, Muslims are allowed to wear kufis in all areas of the prison, leading to none of these consequences. This rule has existed in New York since 1976, and the Department of Correctional Services has taken no steps to restrict the right to wear kufis, confirming, we think, that such security concerns are unfounded. Compare Directive 4204 (dated 10/1/76) with Directive 4202 (dated 11/26/82).

Finally, New York now makes individualized determinations of whether the attendance at religious services of inmates who have violated prison rules in fact would jeopardize security. The early regulations made no provision for inmates in disciplinary status, either in Special Housing Units or keeplock, to participate in congregate worship. In Mawhinney v. Henderson, 542 F.2d 1, 3 (2d Cir. 1976), the Second Circuit held that allegations that such inmates are "routinely denied participation in chapel services without any determination as to the necessity of their exclusion" stated a claim for relief. Directive 4202 now permits a keeplocked inmate to attend congregate services if his attendance would not create a threat to the safe and secure operation of the prison. That

determination is governed by a review of the inmate's infraction, his adjustment and his disciplinary record during the preceeding six months. See Directive 4202 (dated 11/26/82). The Department of Correctional Services has not sought to modify that rule and in Amici's experience the operation of that rule has not jeopardized the security of New York State prisons.

We think that New York's experience demonstrates that a wide variety of religious practices can be accommodated in prison, even where the initial reaction of prison officials is to oppose them on security grounds. Many such practices, once thought to pose great dangers to prison order and security, are now routine aspects of life in New York prisons.

III. PRISON OFFICIALS MUST ACCOMMODATE THE FREE EXERCISE OF RELIGION BY INMATES EXCEPT WHERE A RESTRICTION IS JUSTIFIED AS "NECESSARY OR ESSENTIAL" TO SUBSTANTIAL PENOLOGICAL INTERESTS.

A. The constitutional standard for evaluating First Amendment deprivations in a prison context was settled by this Court in Procunier v. Martinez, 416 U.S. 396 (1974).

The constitutional standard for evaluation of prisoners' claims under the Free Exercise Clause of the First Amendment should not be a subject of controversy at this late date. This Court has long held that convicted prisoners have the right to "reasonable opportunities" to practice their religion. Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972); see also Cooper v. Pate, 378 U.S. 546 (1964). Following Cruz v. Beto, the Court elaborated in Procunier v. Martinez, 416 U.S. 396,

407-16 (1974), the precise scope of the protection afforded established First Amendment rights in the prison context.[17] When, as in this case, prison regulations substantially restrict the exercise of recognized First Amendment rights, the Procunier standard governs. Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985); Barrett v.

[17]As we show in the following section, in the case of "time, place or manner" restrictions, a more lenient standard applies. See pp. 41-47 below; see generally Bell v. Wolfish, 441 U.S. 520, 546-47 (1979); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 131 (1977); Pell v. Procunier, 417 U.S. 817, 826-27 (1974). This distinction is not surprising, for the "breadth of limitations on first amendment rights is manifestly relevant to an assessment of the reasonableness, and hence the constitutionality, of such encroachments." Barrett v. Virginia, 689 F.2d 498, 502 (4th Cir. 1982). In this case, of course, respondents have been absolutely deprived of the right to attend the "central service of the Muslim religion ... commanded by the Qur'an, the central book of the Muslim religion." 595 F. Supp. at 930.

Virginia, 689 F.2d 498, 502 (4th Cir. 1982).

In Procunier, of course, the First Amendment right involved did not belong to the prisoners alone but was the joint "interest of prisoners and their correspondents" outside. 416 U.S. at 408-09, 417. Here, by contrast, it is the prisoners themselves who possess a First Amendment right to the reasonably free exercise of their religion. Cruz v. Beto, 405 U.S. at 322. Regardless of the exact locus of the right, however, what is crucial is that it is to be exercised "in the context of prisons." Procunier v. Martinez, 416 U.S. at 412. Procunier is this Court's most complete statement of how substantial limitations of First Amendment rights are to be analyzed in the prison context, giving appropriate deference to the "substantial

governmental interests of security, order, and rehabilitation." 416 U.S. at 413.[18] The balance struck in Procunier is the same balance to be struck in this case.

In striking this balance, the Procunier Court first held that to justify a regulation encroaching on First Amendment rights, prison officials bear the burden of showing that the regulation actually "furthers one or more of [these] substantial governmental interests." Id. at 413. The Court further held that, even where the regulation is shown to further such an

[18] Procunier has been applied by courts in First Amendment contexts other than prisoner correspondence. See Abdul Wali v. Coughlin, 754 F.2d at 1030 and cases cited. Recognition that the Procunier standard applies to all prisoner First Amendment claims disposes of the argument that religious rights should not receive more protection than other First Amendment rights (see Brief of the United States at 19-28).

interest, "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved" and that an otherwise appropriate regulation "will nevertheless be invalid if its sweep is unnecessarily broad." Id. at 413-14.

In the context of the Free Exercise Clause, the Procunier test amounts to little more than the propositions that prison officials bear the burden of justifying regulations restricting religious practices and that they must accommodate the practice of religion by refraining from restricting it except when "necessary or essential" to their substantial interests.[19] This is in

[19] Procunier, of course, counsels district courts to exercise "judicial restraint" based on an (fn. cont'd)

substance what the en banc Third Circuit held below. 782 F.2d at 420 ("Where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights.") Because petitioners were never put to the burden of showing that substantial security interests actually necessitated restrictions on religious

---

19(fn. cont'd) appreciation of the difficulties of prison administration and of the fact that courts are "ill equipped" to deal generally with prison reform. 416 U.S. at 405. The Court also noted that prison officials should be accorded "latitude in anticipating the probable consequences" of certain actions. Id. at 414. We do not read the decision below as being unmindful of these considerations. See 782 F.2d at 420.

practice, the Third Circuit acted properly in vacating the judgment and remanding for further proceedings. Id. at 421.

B. The deferential standard expressed in Pell v. Procunier, Jones v. North Carolina Prisoners' Union, and Bell v. Wolfish is applicable only where prison officials have taken substantial steps to accommodate First Amendment rights.

Petitioners rely primarily on Pell v. Procunier, 417 U.S. 817 (1974), Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), and Bell v. Wolfish, 441 U.S. 520 (1979). This reliance is misplaced. These cases all arose in situations where, to an extent consistent with substantial institutional interests, prison officials had already accommodated the prisoners' First Amendment rights.20

20Jones is a partial exception to this statement as we note below at p. 45 n. 21. To the extent (fn. cont'd).

The deferential language of these cases thus applies only to cases where accommodation has already occurred and prison officials restrict only the "time, place or manner" of exercising First Amendment rights.

In Pell v. Procunier, the Court recognized that deference to the judgments of prison officials was appropriate where accommodations to First Amendment interests had been made, but not otherwise. Pell was a case, of course, in which substantial accommodation had been made to the right of prisoners to communicate with the press, but "media interviews with specific individual inmates" were

20(fn. cont'd) accommodation was not made in that case, the Court applied the Procunier test. 433 U.S. at 133; see Barrett v. Virginia, 689 F.2d 498, 502 (4th Cir. 1982).

prohibited. 417 U.S. at 819. Pell originated the strongly deferential language that petitioners contend controls this case:

> [C]onsiderations [of security] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

417 U.S. at 827. But Pell itself explicitly stated that such a concept of judicial deference applied because prison officials had already accommodated First Amendment rights. In the paragraph immediately preceding the quoted passage in Pell, the Court noted that not "all expression or communication by prison inmates" could be prohibited. Id. (emphasis

supplied). The Court concluded that it is only "when the issue involves a regulation limiting one of several means of communication" that judicial deference becomes "relevant in gauging the validity of the regulation." Id. (emphasis supplied); see Abdul Wali v. Coughlin, 754 F.2d at 1029-30.

The other important "exaggerated response" cases are similarly ones in which the regulation challenged affected only "one of several" means of exercising a right. In Bell v. Wolfish, for example, the Court expressly relied upon the limited impact of a "publisher-only" rule in holding it to be a valid "time, place and manner" regulation. 441 U.S. at 552. Similarly, in Jones v. North Carolina Prisoners' Union, the union was allowed to make "individual mailings to individual inmates," 433

U.S. at 131 n.8, but bulk mailings to inmates for distribution were prohibited. Id. at 130. The Court, relying on Pell, held that "[s]ince other avenues of outside informational flow by the Union remain available" the restriction was valid. Id. at 130-31.[21]

The rules of deference set out in Pell, Bell and Jones are appropriately applied when, as in those cases, prison

[21] In Jones, associational rights received less accommodation than speech rights. For example, prison officials did not allow "meetings between members of the Union" although they did allow inmates to join the Union. 433 U.S. at 122. Because of the lack of accommodation, in evaluating these association issues the Court cited and applied Procunier. Id. at 133. That is, the Court made the specific finding that officials' concerns about the union were "reasonable" and then held that "the regulations are drafted no more broadly than they need be" under the circumstances. Id. This, we think, eliminates any possible doubt about the vitality of the Procunier analysis after Jones. See Barrett v. Virginia, 689 F.2d at 502.

officials have recognized and accommodated First Amendment interests. Once prison officials have done this and have drawn their regulations narrowly, those challenging a regulation bear a heavy burden to overturn it.

In this case, however, petitioners have quite adamantly refused any accommodation of respondents' right to engage in a central practice of their religion. Petitioners' argument that by permitting Muslims to engage in religious practices other than Jumu'ah they have fulfilled their constitutional obligation (Pet Br. at 36-37) misses the point. There is unique religious content to participation in an observance like Jumu'ah, just as there is unique content to certain speech. A restriction prohibiting attendance at Jumu'ah is thus like a content-based

restriction on speech. It matters little how much other speech the government allows if there are specific subjects that cannot be addressed; similarly it matters little how many other less important religious services are available if Jumu'ah is not. Petitioners have failed to accommodate respondents' religious rights and the standard established in Procunier v. Martinez should apply in this case.

C. The unduly deferential standard formulated by the Third Circuit in St. Claire v. Cuyler would, if adopted, practically eliminate the protection of religious freedom of prisoners.

To adopt the constitutional standard advocated here by petitioners would, we think, fail to give adequate protection to the fundamental values embodied in the Free Exercise Clause of

the First Amendment. The Court has determined that, even in the prison context, the First Amendment protects the right to worship. Cruz v. Beto, 405 U.S. at 322. By its very nature, the standard petitioners put forth deprives courts of the power to enforce this right.

According to petitioners, the standard applied in the district court, and first enunciated in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), should govern this case (Pet. Br. at 28-29). This standard is notable first because it removes, for all practical purposes, any burden on prison officials to justify prohibitions on inmate worship. 634 F.2d at 114. To justify a limitation, however intrusive it might be, they have merely to "produce evidence," consisting of as little as

opinions "held 'sincerely' and arguably correct," and which might be "unimpressive" if used to justify restrictions on religious practice outside of prison, that the regulation was related to a security goal. Id. Once officials have articulated such a relationship, prisoners must carry the enhanced burden of showing by "substantial evidence . . . that the officials have exaggerated their response" to the alleged security need. Id. at 115. This test is so structured that it provides little, if any, protection to the right to congregate worship.

The St. Claire test fails first because abstract security considerations always arise in connection with congregate worship in prison. Such

worship necessarily implies prisoners meeting in an "affinity group" of their fellow Catholics, Jews, Muslims or the like. It always involves inmate movement, staff supervision, and the provision of a chapel or other meeting area. As a matter of abstract logic, it can always be said that inmate movements and meetings present potential security problems or cause a drain on security resources, and that forbidding congregate worship would enhance security. In every case, therefore, the first prong of the St. Claire test can be met.

The second prong of the St. Claire test gives little more protection to free exercise interests, for the theoretical possibility of showing by "substantial evidence" that there has

been an exaggerated response is practically quite limited.[22] This limitation arises primarily because the test provides no protection against prison officials' positing the existence of extreme, if improbable, potential dangers, beside which no response would be exaggerated. To justify even the most trivial rule, such as one forbidding inmates to leave leftovers on their plates at meals, "scenarios could always be constructed whereby, for

[22]This is true in part because the meaning of "exaggerated response" is far from clear. The words partake, we think, more of the "rhetoric of judicial deference," Block v. Rutherford, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring), than of any useful analysis for deciding cases. It is simply not clear, at least in free exercise cases, what must be exaggerated in relationship to what or what is necessary to show an exaggeration.

example, an inmate who left food on his plate could be said to be challenging authority in a way that, left unpunished, might result in widespread rebellion." J. Jacobs, Stateville: The Penitentiary in Mass Society 41 (1977). Prison officials have, indeed, presented such scenarios to justify denials of religious worship, arguing that allowing Muslim services would "inevitably" cause "riots, bloodshed, death and destruction."[23] Bryant v. McGinnis, 463 F. Supp. 373, 381 (W.D.N.Y. 1978).

[23]As we note above, pp. 6-7, this concern proved unfounded. Amici's New York experience suggests that there is often a wide gulf between articulation of a security concern in the abstract and the realization of a potential danger. New York thus permits many practices that officials in other jurisdictions have claimed were a serious potential threat. See pp. 25-34, above.

In this case, petitioners have predicted that if Muslims are allowed to work together they will form an "affinity group" that "absolutely will lead to confrontation" (Tr. 182). Such predictions are notoriously hard to disprove, especially by "substantial" evidence, and in the face of such extreme, if unlikely, dangers, courts will be most hesitant to call any response "exaggerated."

The final failing of the St. Claire test is that it leaves no room for considering whether or not religious practices are inevitably in conflict with prison security or whether there are means by which both might be served. Indeed, petitioners explicitly reject the propriety of such considerations, arguing that "[j]ust because a judge may devise one reasonable way to meet

security problems, does not mean that any other choice is unconstitutional." (Pet. Br. at 32). But if the First Amendment means anything, it must mean that if there is "one reasonable way" to meet security needs and to allow the free exercise of religion, that means must be adopted. For in such a case, prison officials have no interest in suppressing the religious exercise. It was an appreciation of this that led the Third Circuit to adopt its accommodation standard and to overrule St. Claire v. Cuyler. See 782 F.2d at 419-20.

D. Petitioners' justifications for denying access to the Jumu'ah services are not substantial.

Encroachments on fundamental First Amendment interests must, even in a prison context, be justified by a showing that they "further an important

or substantial" governmental interest. Procunier v. Martinez, 416 U.S. at 413; cf. Goldman v. Weinberger, 106 S. Ct. 1310, 1325 (1986) (O'Connor, J., dissenting) (military context). We think that this standard requires something more than an abstract logical connection between a major interest and the restriction in question; rather, the restriction must be "substantially justified," Barrett v. Virginia, 689 F.2d at 503, by the need present on the facts of a given case. At a bare minimum this means that the government must "consistently" and "plausibly" justify its regulation in the existing circumstances. Goldman v. Weinberger, 106 S. Ct. at 1326 (O'Connor, J., dissenting). On the facts of this case, petitioners cannot meet even this

minimal burden.[24]

The direct cause of the abridgment of respondents' rights in this case was the decision to prohibit one to two dozen gang-minimum Muslims from working on Friday inside the prison on a wood-cutting detail. Prior to March, 1984, when this decision was made, there is no evidence that the participation of gang-minimum Muslims in this detail actually caused any security problem.[25] Indeed, petitioners concede that they approved

[24]Thus, we do not think it necessary to reach the second question of whether it was "necessary or essential" to the furtherance of these interests to impose these restrictions.

[25]Petitioners made a bare allegation that Muslims who elected to attend Jumu'ah did not do so. We think the record does not support this allegation. See p. 6, n.4, above. Even if it did, petitioners obviously dealt adequately with the situation by disciplining inmates who failed to appear at the proper location. Petitioners' restriction of the (fn. cont'd)

the work of the Muslims on the details for the period prior to that March (Pet. Br. at 14). Thus their claim that allowing Muslims to do this work one day a week conflicts with substantial security interests is in fundamental contradiction with their own actions.

Despite this basic inconsistency, defendants now argue that allowing ten to twenty medium-security Muslims to work together one day a week would create an "affinity group" that would "absolutely" cause internal disorder (Tr. 182). This contention is irrational in light of the ample evidence in this record showing that

[25](fn. cont'd) religious rights of respondents because of the abuses of a few others, for which there was an adequate remedy, is not substantially justified here. Barrett v. Virginia, 689 F.2d at 503. Such a restriction would clearly sweep too broadly. Procunier v. Martinez, 416 U.S. at 413-14.

petitioners do not fear allowing Muslims to associate. Indeed, meetings of Muslims for prayer have long been tolerated, occur frequently, and are virtually unrestricted (Tr. 23, 26, 92, 182-83, 195; Jt. App. at 137-45). It is incredible that allowing ten to twenty gang-minimum Muslims to associate for a few additional hours on Friday would enhance the abstract risk that Muslims might "challenge institutional authority" (Tr. 179). Were there any real risk of this, petitioners would surely not have allowed Muslims extensive freedom to associate, including the freedom to participate in the alternate detail before March, 1984.[26]

[26]If on these facts prisoners' religious services can be forbidden, they can be forbidden by the same rationale at any time for any religious group at the whim of prison officials. (fn. cont'd)

As a second justification, petitioner O'Lone argued that allowing Muslims to escape "rigorous" work on Friday would cause resentment among other inmates and give rise to security problems (Tr. 178-79). But the alternate wood-cutting detail involves no exemption from hard work and there is thus no ground for resentment. There is no evidence that the former existence of the detail ever caused resentment of any kind. There is simply no factual basis for this argument on

[26](fn. cont'd) On a proper record, of course, religious meetings might be shown to present a security threat and be forbidden. See Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984), cert. denied, 469 U.S. 1215 (1985); cf. Jones v. North Carolina Prisoners' Union, 433 U.S. at 132-33 (union meetings). But it is not "reasonable," or even plausible, to believe that such circumstances exist here. Cf. Jones v. North Carolina Prisoners' Union, 433 U.S. at 133.

this record.[27]

The last arguable security justification advanced for abolishing Muslim participation in the wood-cutting detail is that petitioners were trying to deal with overcrowded conditions by sending as many inmates as possible out of the institution (Tr. 176) (Pet. Br. at 15). But conditions in March, 1984 were no more crowded than they had been during the preceding year when the alternate detail was permitted. See pp. 9-11 and n.6, above. Moreover, the effect of the presence of ten or twenty additional inmates in the prison one day a week is surely de minimus in relation

[27]We do not take petitioners' argument to be that treating Muslims differently, as opposed to preferentially, would cause resentment. Such an argument, if made, would permit the suppression of all minority religions on the ground that the majority might resent the minority because they were allowed to engage in different practices.

to the total of six hundred or more other inmates there.[28] The Muslims were, after all, hard at work cutting wood or in religious services and not putting "pressure" on the gymnasium, mess hall, or housing areas. The marginal security interest in banishing these few Muslims from the prison on Friday is, if it exists at all, simply not the "substantial" kind of interest necessary to overcome First Amendment rights.

[28]As a corollary to the overcrowding argument, petitioners now suggest that they "needed to make that work detail available for maximum security inmates" (Pet. Br. at 14). The regular detail was at all times available to these inmates, however, and the ten to twenty Muslims merely joined it on Fridays (Tr. 26). There was always plenty of wood to cut for everyone (Tr. 27). Moreover, petitioners' documents show that the number of inmate workers inside did not increase between July, 1983 and March, 1984; indeed, it decreased from 628 to 613. See p. 9 n.6, above. Thus, there was no increased demand for such jobs.

None of the interests advanced by petitioners can be said, on the actual facts of this case, to be "substantial."[29] To the extent that petitioners claim they are, petitioners' own behavior and the independent evidence rebuts them. Thus, the restriction on respondents' participation in Jumu'ah cannot be justified.

[29]Arguments that petitioners cannot assign inmates to work details based on religion are also belied by the record and petitioners' past behavior. See p. 11 n.7, above. Such concerns are mere matters of bureaucratic convenience and not the weighty kind of interest necessary to overcome religious rights, even in a prison context.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

Stephen M. Latimer
Counsel of Record
David C. Leven
Prisoners' Legal Services
of New York
105 Chambers Street
New York, New York 10007
(212) 513-7373

Philip L. Weinstein
David A. Lewis
The Legal Aid Society
Prisoners' Rights Project
15 Park Row - 7th Floor
New York, New York 10038
(212) 577-3530